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KERAJAAN MALAYSIA v. ROHANA ABU

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN JC
[SUIT NO: WA-21NCVC-74-08-2016]
28 FEBRUARY 2018

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CIVIL PROCEDURE: *Summary judgment – Application for – Whether preliminary requirements satisfied – Whether burden shifted to defendant – Whether defendant established triable issues – Whether a fit and proper case to grant summary judgment – Rules of Court 2012, O. 14 r. 1*

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REVENUE LAW: *Taxing statute – Construction – Income Tax Act 1967, s. 75A(2)(b) – Liability of director of wound-up company for additional taxes – Director held 20% shareholding – Notices of assessment issued prior to coming into effect of amendment to s. 75A(2)(b) – Whether amendment to s.75A(2)(b) retrospective in effect – Whether applicable to director – Whether director jointly and severally liable for company's taxes*

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The plaintiff applied, *vide* encl. 26, for summary judgment under O. 14 r. 1 of the Rules of Court 2012 ('ROC') and the defendant applied, *vide* encl. 31, to strike-out the writ of summons and statement of claim under O. 18 r. 19(1)(b), (c) and/or (d) and O. 92 r. 4 of the ROC. The plaintiff filed a tax recovery claim under s. 75A of the Income Tax Act 1967 ('ITA') against the defendant as a director of Rimba Ramin Sdn Bhd ('the company') with a shareholding of 20% in year of assessment ('YA') 2008, YA 2009 and YA 2010. Lembaga Hasil Dalam Negeri, for and on behalf of the plaintiff, had issued, against the company, three additional notices of assessment for the YA 2008, YA 2009 and YA 2010 for the sums of RM56,142.01, RM6,761,329.34 and RM6,505,494.60 respectively. The company was subsequently wound up. The plaintiff submitted that the income tax claimed from the defendant was based on the date the notices of assessments were issued on the company and not the YAs of the additional income tax claimed. The plaintiff further argued that the amendment to s. 75A(2)(b) of the ITA applied to the period of YA 2008, YA 2009 and YA 2010 because the notices of assessments were issued in 2015. The defendant, on the other hand, contended that s. 75A of the ITA did not apply to the defendant. The issues for the court's determination were (i) whether the amendment to s. 75A(2)(b) of the ITA pursuant to the Finance Act 2014 ('FA 2014') was retrospective; and (ii) whether the defendant was liable for additional taxes raised against the company during the period prior to the amendment to sub-s. 2(b) of s. 75A of the ITA.

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Held (dismissing plaintiff's application in encl. 26; allowing defendant's application in encl. 31):

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(1) Section 75A of the ITA was amended by the Finance Act 2005 (Act 644) and was further amended by s. 20 of the FA 2014. Prior to the coming into operation of the FA 2014, a director is defined in s. 75A of the ITA

as a person who holds the position of director and holds more than 50% shares in the company during the period the tax is liable to be paid. After the coming into operation of the FA 2014, s. 75A of the ITA defined a director as a person who holds the position of director and holds not less than 20% shares in the company during the period the tax is liable to be paid. (paras 10, 11 & 13)

(2) An Act, particularly amending statutes, shall not be construed retrospectively unless it is expressly provided for in the statute passed by Parliament. The general rule is that statutes, particularly amending statutes, are *prima facie* prospective. In the instant case, the FA 2014 is the amending Act. It had the effect of amending, among others, s. 75A(2)(b) of the ITA. Section 3 of the FA 2014 expressly states that s. 20 of the FA 2014 will 'come into operation on the coming into operation of this Act (FA 2014)'. There are no words in the FA 2014 which states that s. 20 of the FA 2014 and/or the amendment to s. 75A of the ITA will take effect on a date prior to the date the FA 2014 came into operation. (paras 17 & 19)

(3) The notices of assessment for the additional tax raised for YA 2008, YA 2009 and YA 2010 herein were issued on the company in 2015, after the company was wound-up, and after the amendment to s. 75A(2)(b) of the ITA came into operation. Although the notices of assessment were issued to the company in 2015, the additional taxes were for a period prior to the amendment to s. 75A(2)(b) coming into operation. In the circumstances, the defendant was not jointly and severally liable for the company's taxes for the YA 2008, YA 2009 and YA 2010 because she did not come within the definition of 'director' of the company under s. 75A of the ITA. The plaintiff's case against the defendant was plainly and obviously unsustainable and hence, the plaintiff's claim against the defendant was struck out. (paras 28, 31, 38 & 39)

(4) In every application under O. 14 of the ROC, once it is established that the claim comes within O. 14 r. 1 and the plaintiff has met the preliminary requirements for proceeding under O. 14 as set out in O. 14 r. 2, the burden shifts to the defendant to satisfy the court that there is an issue or question to be tried with respect to the claim or part thereof. The plaintiff had satisfied the preliminary requirements and the burden therefore fell on the defendant to satisfy the court that there were triable issues in relation to the plaintiff's claim. The defendant had successfully raised the triable issue that s. 75A of the ITA did not apply to the defendant and therefore, this was not a fit and proper case to grant summary judgment against the defendant. (paras 40 & 41)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Federal Express Brokerage Sdn Bhd & Ors v. Malaysia Airports (Sepang) Sdn Bhd & Anor [2013] 4 CLJ 208 CA ***(refd)***

Kerajaan Malaysia v. Mohd Ilyas Pakeer Mohamed dan Zaharah Ahmad (Civil Suit No. 21NCVC-57-09-2014) (Unreported) ***(dist)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

National Land Finance Co-Operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

PP v. Datuk Hj Harun Hj Idris [1976] 1 LNS 96 HC ***(refd)***

Legislation referred to:

Finance Act 2014, ss. 2, 3, 20

Income Tax Act 1967, ss. 75A(2)(b), 106(1), Schedule 9 para 33

Interpretation Acts 1948 and 1967, ss. 17A, 19, 34

Rules of Court 2012, O. 14 rr. 1, 2, O. 18 r. 19(1)(b), (c), (d), O. 92 r. 4

For the plaintiff - Nur Aina Mohd Jaafar; FC, Inland Revenue Board
For the defendant - Harold Tan Kok Leng; M/s Harold & Lam Partnership

Reported by S Barathi

JUDGMENT

Faizah Jamaludin JC:

Introduction

[1] These are my grounds of judgment in respect to the plaintiff's application for summary judgment under O. 14 r. 1 of the Rules of Court 2012 ("ROC") (encl. 26) and the defendant's application to strike-out the writ of summons and statement of claim under O. 18 r. 19(1)(b), (c) and/or (d) and O. 92 r. 4 of the ROC (encl. 31).

Background

[2] This is a tax recovery claim filed by the plaintiff against the defendant. The Lembaga Hasil Dalam Negeri for and on behalf of the plaintiff had issued against Rimba Ramin Sdn Bhd (the "company") three additional notices of assessment dated 18 August 2015, 18 August 2015 and 14 August 2015 for the year of assessment ("YA") 2008, YA 2009 and YA 2010 for the sums of RM56,142.01, RM6,761,329.34 and RM6,505,494.60 respectively.

[3] The defendant was a director and shareholder of Rimba Ramin Sdn Bhd (the "company"). It is not disputed that she held exactly twenty percent (20%) of the ordinary shares in the company at all material times. The company was wound up on 25 January 2013.

[4] The claim is brought by the plaintiff against the defendant under s. 75A of the Income Tax Act 1967 ("ITA") as a director of the company with a shareholding of twenty percent (20%) in YA 2008, YA 2009 and YA 2010.

Plaintiff's Case

[5] The plaintiff claims that the defendant being a director of the company and shareholder of twenty percent (20%) of the company's shares during the period of YA 2008, YA 2009 and YA 2010 is jointly and severally liable under s. 75A of the ITA for the additional income tax raised by the plaintiff against the company pursuant to the notices of assessment issued in August 2015.

[6] The plaintiff submits that the income tax claimed from the defendant is based on the date the notices of assessments were issued on the company and not the YAs of the additional income tax claimed.

[7] The plaintiff argues that the amendment to s. 75A(2)(b) of the ITA applies to the period of YA 2008, YA 2009 and YA 2010 because the notices of assessment were issued in 2015.

Defendant's Case

[8] The defendant relies on the sole argument that based on the facts of this case, s. 75A of the ITA does not apply to the defendant.

Issues For Determination

[9] Section 106(1) of the ITA states that:

> Tax due and payable may be recovered by the Government by civil proceedings as debt due to the Government.

[10] Section 75A of the ITA was introduced by the Finance Act (No. 2) 2002 (Act 624) and took effect on 27 December 2002. The section was amended by the Finance Act 2005 (Act 644) which took effect from 1 January 2006. Section 75A as amended by Act 644 reads as follows:

> 75A (1) Notwithstanding anything contrary to this Act or any other written law:
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> (a) where any tax is due and payable under this Act by a company, **any person who is a director of that company during the period in which that tax is liable to be paid by that company**; or

A (b) where any debt is due and payable from an employer under any rules made pursuant to section 107 and the employer is a company, any person who is a director of that company during the period in which the debt is liable to be paid by that company,

shall be jointly and severally liable for such tax or debt, as the case may
B be, that is due and payable and shall be recoverable under section 106 from that person.

(2) In this section, **"director" means any person who**:

(a) is **occupying the position of director** (by whatever name called), including any person who is concerned in the management of the
C company's business; and

(b) is, either on his own or with one or more associates within the meaning of subsection 139(7), the owner of, or able directly or through the medium of other companies or by any other indirect means to **control, more than fifty per cent of the ordinary share**
D **capital of the company** ("ordinary share capital" here having the same meaning as in the definition of "director" in section 2).

(emphasis added)

[11] Section 75A was further amended by s. 20 of the Finance Act 2014 (Act 761)("FA 2014") in 2014. Section 20 of the FA 2014 amended
E sub-s. (2)(b) by substituting the words "more than fifty percent" with the words "not less than twenty percent".

[12] Section 75A of ITA after sub-s. (2)(b) was amended by FA 2014 reads as follows:

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(2) In this section, **"director" means any person who**:

(a) is **occupying the position of director** (by whatever name called), including any person who is concerned in the management of the company's business; and

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(b) is, either on his own or with one or more associates within the meaning of subsection 139(7), the owner of, or able directly or through the medium of other companies or by any other indirect means **to control, not less than twenty per cent of the ordinary share capital of the company** ("ordinary share capital" here having
H the same meaning as in the definition of "director" in section 2).

[13] The amendment to s. 75A(2)(b) took effect on the coming into operation of the FA 2014 on 23 January 2014. Prior to the FA 2014 coming into operation, a director is defined in s. 75A of the ITA, as a person who holds the position of director and holds more than fifty percent (50%) shares
I in the company during the period the tax is liable to be paid. After the coming into operation of the FA 2014, a director is defined in s. 75A of the

ITA, as a person who holds the position of director and holds not less than twenty percent (20%) shares in the company during the period the tax is liable to be paid.

[14] In my view, for this court to determine whether the tax claimed by the plaintiff from the defendant in this suit is due and payable by the defendant, it must consider the following issues:

(a) Is the amendment to s. 75A(2)(b) of the ITA pursuant to the FA 2014 retrospective? and

(b) Is the defendant liable for additional taxes raised against the company during the period prior to the amendment to sub-s. 2(b) of s. 75A of the ITA?

Is the Amendment to s. 75A(2)(b) Of ITA By FA 2014 Retrospective?

[15] Section 75A(2)(b) of the ITA was amended by the FA 2014. The long title of the FA 2014 is:

> An Act to amend the Income Tax Act 1967, the Stamp Act 1949, the Petroleum (Income Tax) Act 1967, the Real Property Gains Tax Act 1976 and the Labuan Business Activity Tax Act 1990.

The relevant sections of FA 2014 are:

(a) Section 2 which reads as follows:

> Amendment of Acts
>
> 2. The Income Tax Act 1967 [Act 53] ... are amended in the manner specified in Chapters II ... respectively

(b) Chapter II, which reads as follows:

> CHAPTER II
>
> AMENDMENTS TO THE INCOME TAX ACT 1967
>
> 3. Commencement of amendments to the Income Tax Act 1967
>
> ...
>
> (2) Sections 6, 20, 23, 24, 27, 28, 29, 31 and 32 come into operation on the coming into operation of this Act.
>
> 20 Amendment of section 75A
>
> Paragraph 75A(2)(b) of the principal Act is amended by substituting for the words "more than fifty" the words "not less than twenty".

[16] The FA 2014 received the Royal Assent on 15 January 2014 and was published in the *Gazette* on 23 January 2014. Pursuant to s. 19 of the Interpretation Acts 1948 and 1967 (Act 388) ("IA"), the FA 2014 came into operation the date immediately following the date of its publication ie, on

24 January 2014 (per Ramly Ali JCA at para. 35 of *Federal Express Brokerage Sdn Bhd & Ors v. Malaysia Airports (Sepang) Sdn Bhd & Anor* [2013] 4 CLJ 208; [2012] 5 AMR 197; [2012] 6 MLJ 190). I have to respectfully disagree with counsel for plaintiff and defendant who had both submitted that the amendment to s. 75A(2)(b) came into operation on 23 January 2014 which is the date of the publication of the *Gazette*. Accordingly, pursuant to s. 3 of the FA 2014, s. 20 came into operation on the coming of the operation of FA 2014 namely on 24 January 2014. There are no words in FA 2014 which state that s. 20 or the amendment to s. 75A(2)(b) shall have a retrospective effect or that it shall have effect prior to date of the FA 2014 coming into operation.

[17] There is a surfeit of Federal Court and Supreme Court cases, which all hold that an Act, particularly amending statutes shall not be construed retrospectively unless it is expressly provided for in the statute passed by Parliament. The Federal Court in *PP v. Datuk Haji Harun Hj Idris* [1976] 1 LNS 96; [1977] 1 MLJ 14; held that the general rule is that statutes, particularly amending statutes, are *prima facie* prospective. It held that a statute is not to be construed retrospectively unless it is clear that such was the intention of Parliament from the language of the Act itself. Raja Azlan Shah FJ (as HRH then was) in delivering the judgment of the Federal Court held that:

> **The general rule is that statutes, particularly amending statutes, are *prima facie* prospective, and retrospective effect is not to be given to them unless by clear words or necessary implication**. This presumption does not always apply in cases of legislation dealing with procedure or evidence.
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> (emphasis added)

[18] Raja Azlan Shah FJ in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187, held that the rule of construction is that in order to determine whether an Act of Parliament is retrospective in its operation, the language of the Act must be looked into and that an Act should not be construed retrospectively unless it was clear from the language of the Act that it was the intention of Parliament. His Lordship held that:

> *In so far as an Act of Parliament is concerned, the rule of construction is that in order to determine whether it is retrospective in its operation, the language of the Act itself must be looked into bearing in mind that an Act is not be construed retrospectively unless it is clear that such was the intention of Parliament*. If such was the intention that the Act was to be given retrospective effect even in respect of substantive right or pending proceeding, the courts have no alternative but to give effect to the Act even though the consequences might appear harsh and unjust.
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> (emphasis added)

[19] In this instant case, the FA 2014 is the amending Act. It had the effect of amending, among others, s. 75A(2)(b) of the ITA. Section 3 of the FA 2014 expressly stated that s. 20 (ie, the section of the FA 2014 that amended s. 75A(2)(b) of ITA) will "come into operation on the coming into operation of this Act (FA 2014)". There are no words in the FA 2014 which state that s. 20 of FA 2014 and/or the amendment to s. 75A of the ITA will take effect on a date prior to the date the FA 2014 came into operation.

[20] Section 34 of the IA states that:

> Where a written law amends another written law, the amending law shall be read and construed as one with the amended law.

[21] Applying the rules of construction, on my plain reading of the language in the FA 2014, Parliament did not intend for s. 20 of the FA 2014 to apply retrospectively. There are no words in the FA 2014 which expressly states that s. 20 or the amendment to s. 75A(2)(b) will be given retrospective effect or that it shall have effect prior to the date of the FA 2014 coming into operation. Accordingly, applying s. 34 of the IA, the FA 2014 also did not intend for the amended s. 75A(2)(b) to apply retrospectively to directors with "not less than twenty" percent shares in the company. Therefore, I find that on the plain reading of the FA 2014 and pursuant to s. 3 of the FA 2014, s. 20 came into operation on the coming of the operation of FA 2014 namely on 24 January 2014.

[22] In *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2004] 4 AMR 202; [2005] 3 MLJ 97; the Federal Court held that the Palm Oil Research and Development Act 1979 is a taxing statute and that pursuant to s. 17A of the IA the purposive approach is to be used for statutory interpretations.

[23] In *National Land Finance Co-Operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99, the question was raised whether the words of the amendment made by the Income Tax (Amendment) Act 1980 (the "Amendment Act") to para. 33 of Sch. 9 of the ITA was capable of removing the exemption from tax granted to the appellant taxpayer by s. 13(1)(f)(ii) of the Income Tax Ordinance 1947 (Repealed) (the "Ordinance"). The Supreme Court held that the provisions of ITA must be construed having regards to the IA. It held that the appellant taxpayer had an acquired right to exemption under the Ordinance when ITA came into force and that acquired right should be ruled prospectively and not retrospectively. Gunn Chit Tuan CJ (Malaya) in delivering the judgment of the Supreme Court said as follows:

> Therefore, following the decision of Viscount Dilhorne, Lord Diplock and Lord Edmund-Davies in the House of Lords case of *Floor v. Davis (Inspector of Taxes)* [1980] AC 695, **the provisions of the Act must be construed having regard to the Interpretation Acts 1948 and 1967**. There

A is therefore a doubt whether the legislature had intended to impair the existing right of the taxpayer and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. **As there is a doubt, the ambiguity must be construed in favour of the taxpayer as the said exemption from tax has not been removed by sufficiently clear words to achieve that purpose**.

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(emphasis added)

[24] The effect of amendment brought about by the FA 2014 to s. 75A(2)(b) of ITA is to reduce the statutory shareholding threshold of company directors from "more than fifty percent" to "not less than twenty percent". The C Supreme Court in *National Land Finance Co-Operative Society* held that the amendment cannot be interpreted retrospectively so as "to impair the existing right of the taxpayer and inflict a detriment to it", unless the language of the amending Act and/or the amended Act clearly and expressly states that it is retrospective.

D **[25]** The effect of the amendment to s. 75A(2)(b) is to impair the existing right of directors with at least twenty percent (20%) shareholding in a company. Directors who have at least twenty percent (20%) shares in a company will now be jointly and severally liable for the company's taxes. Whereas prior to the amendment taking effect, such twenty percent (20%) E shareholder directors would not be liable for the company's taxes. In this instant case, a retrospective application of the amendment to s. 75A(2)(b) of ITA would impair the defendant's existing right and inflict a substantial detriment on her, namely the company's additional tax liability for YA 2008, YA 2009 and YA 2010 of over RM15 million - a sum she would have F not been liable to pay but for a retrospective application of the amendment to s. 75A(2)(b).

[26] The language of the amending Act (FA 2014) and the language of the amended Act (ITA) do not expressly and clearly state that the amendment to s. 75A(2)(b) of ITA is to operate retrospectively.

G **[27]** For these reasons, I find that the amendment to s. 75A(2)(b) of ITA is not retrospective and does not take effect prior to the coming into operation of the FA 2014.

Is The Defendant Liable For Additional Taxes Raised Against The Company H *During The Period Prior To The Amendment To Subsection 2(b) Of Section 75A of ITA?*

[28] In this instant case, the notices of assessment for the additional tax raised for YA 2008, YA 2009 and YA 2010 were issued on the company in 2015 after the company was wound up and after the amendment to I s. 75A(2)(b) of the ITA came into operation. The plaintiff's claim against the defendant is for the recovery of the company's additional taxes for YA 2008,

YA 2009 and YA 2010; a period which pre-dates the coming into operation of the amendment to s. 75A(2)(b) of the ITA. Therefore, although the notices of assessment were issued to the company in 2015, the additional taxes are for a period prior to the amendment to s. 75A(2)(b) coming into operation.

[29] Section 75A of the ITA stipulates that:

> any person who is a **director** of that company **during the period in which that tax is liable to be paid** by that company.
>
> (emphasis added)

[30] In this instant case, the period for which the company is liable for the additional taxes raised is YA 2008, YA 2009 and YA 2010. Pursuant to s. 75A, during that period, "director" of the company is "any person who is occupying the position of director ... and is ... the owner of ... more than fifty percent of the ordinary share capital of the company ...". During the YA 2008, YA 2009 and YA 2010, the defendant was a director of the company but held only twenty percent (20%) shares in the company. Therefore, pursuant to s. 75A, she was not a "director" of the company "during the period in which that tax is liable to be paid by the company".

[31] Therefore, I find that the defendant is not jointly and severally liable for the company's taxes for the YA 2008, YA 2009 and YA 2010 because she did not come within the definition of "director" of the company under s. 75A of the ITA.

[32] The plaintiff referred to an unreported case of the Kuala Lumpur High Court (Civil Suit No. 21NCVC-57-09-2014) *Kerajaan Malaysia v. Mohd Ilyas Pakeer Mohamed dan Zaharah Ahmad*, where the High Court dealt with s. 75A of the ITA. However, the facts of *Mohd Ilyas* is distinguishable from this instant case. In *Mohd Ilyas*, the notices of assessment were raised in 2007 for YA 2002, YA 2003 and YA 2004. These notices of assessment were raised on a date and for a period prior to the amendment to s. 75A(2)(b) by the FA 2014. At that material time, s. 75A defined "directors" as directors of a company who owned "more than fifty percent" ordinary shares in the said company. The court found that both directors in *Mohd Ilyas* held "more than fifty percent" ordinary shares of the company and were therefore liable pursuant to s. 75A of the ITA for the additional tax imposed on the company. Although, it must be said that I am rather baffled how the court in that case found that both directors held "more than fifty percent" since it is mathematically impossible to have more than 100% shares in a company.

[33] The other cases cited by counsel for the plaintiff do not relate to s. 75A of the ITA. I find that they do not support the plaintiff's argument that the defendant is liable for the company's additional taxes for the YAs before the amendment to s. 75A(2)(b) came into operation.

[34] For this reason, I find that the defendant is not jointly and severally liable for the additional taxes raised on the company for the period of YA 2008, YA 2009 and YA 2010.

Enclosure 31

[35] The defendant's application in encl. 31 is to strike out the writ of summons and statement of claim under O. 18 r. 19(1)(b), (c) and/or (d) and O. 92 r. 4 of the ROC.

[36] It is settled law that this court should only exercise its discretion to strike out an action where the action is obviously unsustainable. The oft-quoted decision of the Supreme Court in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 2 AMR 1969; [1993] 3 MLJ 36 which supports this legal principle states as follows:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable".

[37] The plaintiff's claim against the defendant is on the basis that she is a director of the company and holds twenty percent (20%) shares of the company. The plaintiff's case is that the amendment to s. 75A(2)(b) of the ITA has retrospective effect. Therefore, the plaintiff argues, where notices of assessments are issued after the coming into operation of the amendment to s. 75A(2)(b) of ITA, a director with 20% shareholding shall be liable for the additional taxes of the company raised through that notices of assessment even though it is for the period before the amendment of s. 75A(2)(b) came into operation.

[38] Having found that the amendment to s. 75A(2)(b) of ITA does not have a retrospective effect and that the defendant was not a director for purposes of s. 75A of the ITA for the period of YA 2008, YA 2009 and YA 2010s, I find that the plaintiff's case against the defendant is plainly and obviously unsustainable. Even though the notices of assessments for the additional taxes raised in 2015, as the defendant was not a director under s. 75A during the period in which the additional tax is liable to be paid by the company, she is accordingly not jointly and severally liable for such tax.

[39] Therefore, for this reason, I find that it is proper for this court to exercise its discretion to strike out the plaintiff's claim against the defendant.

Enclosure 26

[40] The plaintiff's application in encl. 26 is for summary judgment to be entered against the defendant under O. 14 of the ROC. The law on summary judgment under O. 14 r. 1 of the ROC is well settled. As outlined by the Federal Court in *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300; in every application under O. 14 once it is established that the claim comes within O. 14 r. 1 and the plaintiff has met the preliminary requirements for proceeding under O. 14 as set out in O. 14 r. 2, the burden shifts to the defendant to satisfy the court that there is an issue or question to be tried with respect to the claim or part thereof. It is not disputed that the plaintiff has satisfied the preliminary requirements and that the application comes within O. 14. The burden therefore falls on the defendant to satisfy the court that there are triable issues in relation to the plaintiff's claim.

[41] For the reasons above, I find that the defendant had successfully raised the triable issue that s. 75A of the ITA does not apply to the defendant. I therefore find that this case is not a fit and proper case to grant summary judgment against the defendant.

Decision

[42] For the reasons above, the plaintiff's application for summary judgment against the defendant in encl. 26 is hereby dismissed.

[43] Further, for the reasons above, the defendant's application in encl. 31 is allowed. The writ of summons and statement of claim is hereby struck-out.

[44] Cost for both applications is granted to the defendant.